



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEB 27 2018

Mr. John W. Kern
P.O. Box 503
Houghton, MI 49931

RE: MUR 7115

Dear Mr. Kern:

On August 9, 2016, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 6, 2018, the Commission found no reason to believe that you violated 52 U.S.C. §§ 30116(a), 30123, and 11 C.F.R. § 110.4(c). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Anne Robinson, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Jin Lee".

Jin Lee
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5
6 **RESPONDENTS:** AJ Kern for Congress and John W. Kern MURs 7112 and 7115
7 in his official capacity as treasurer
8 John W. Kern
9

10 **I. INTRODUCTION**

11 The Complaints in these matters make a number of allegations that AJ Kern for Congress
12 and John W. Kern in his official capacity as treasurer (the "Committee"), the authorized
13 committee of Congressional candidate Aliena Jeanene Kern (AJ Kern"), and John Kern in his
14 personal capacity, violated the Federal Election Campaign Act of 1971, as amended, (the "Act").
15 The Complaint in MUR 7112 alleges that the Committee failed to include required best efforts
16 information in online solicitation forms. The Complaint in MUR 7115 alleges that the
17 Committee failed to timely and accurately report its activities and that it received an excessive
18 contribution from John Kern and a prohibited corporate contribution from The Boot Shack, Inc.
19 In response, the Committee presents information showing that it has remedied each of the
20 potential violations stemming from the allegations in the Complaints.¹

21 Because of the Committee's remedial efforts and the small amount of the activity at
22 issue, the Commission concludes that none of the allegations merit further use of its resources.
23 Accordingly, the Commission: (1) dismisses the allegations that the Committee violated
24 52 U.S.C. § 30104(a)(2) and 11 C.F.R. § 104.5 by untimely filing its 2016 April Quarterly
25 Report and Pre-Primary Report; (2) finds no reason to believe that John Kern made, and the
26 Committee accepted, excessive contributions in violation of 52 U.S.C. § 30116(a) and (f); (3)
27 dismisses the allegations that the Committee violated 52 U.S.C. § 30104(b)(3)(A) by failing to

¹ Committee Resp. at 1, MUR 7115 (Oct. 5, 2016); Committee Resp. at 2, MUR 7112 (Aug. 17, 2016).

1 accurately report AJ Kern as a contributor; (4) finds no reason to believe that John Kern made
2 and the Committee accepted excessive cash contributions in violation of 52 U.S.C.
3 § 30123 and 11 C.F.R. § 110.4(c); (5) dismisses the allegation that the Committee violated
4 52 U.S.C. § 30118(a) by accepting corporate contributions; (6) finds no reason to believe that the
5 Committee violated the best efforts provisions of 52 U.S.C. § 30102(i) and 11 C.F.R. § 104.7(a);
6 and (7) dismisses the allegation that the Committee violated 52 U.S.C. § 30120(a)(1) and
7 11 C.F.R. § 110.11 by failing to include proper disclaimers in its communications.

8 **II. FACTUAL AND LEGAL ANALYSIS**

9 AJ Kern was a congressional candidate in Minnesota's 6th Congressional District in the
10 2016 Republican primary election. John Kern is the candidate's husband and also the treasurer
11 of the Committee. During the 2016 election cycle, the Committee raised \$16,031 in
12 contributions and spent \$27,925.² The candidate loaned the Committee \$13,000.³

13 **A. Failure to Timely File Reports**

14
15 The Complaint alleges that the Committee filed its 2016 April Quarterly Report late and
16 failed to file its pre-election report for the August primary.⁴ The Committee admits that it
17 untimely filed its April Quarterly Report on April 19, 2016, but argues that it was due on
18 April 18, 2016 and therefore was only one day late.⁵ The Committee filed its Pre-Primary Report
19 on August 4, 2016 and claims that it was only one day late.⁶

² Amend. 2016 Year-End Report, AJ Kern for Congress (Apr. 11, 2017).

³ *Id.*

⁴ Compl. at 1, 3, MUR 7115. The pre-election report was due on July 28, 2016.

⁵ Committee Resp. at 1-2, MUR 7115.

⁶ *Id.* at 1-2. The Commission's Reports Analysis Division ("RAD") notified the Committee of its untimely Pre-Primary Report. See Request for Additional Information at 1, AJ Kern for Congress (Jul. 29, 2016).

1 In an election year, a principal campaign committee must file quarterly reports on April
2 15, July 15, October 15, and January 31.⁷ In addition, pre-election reports must be filed no later
3 than 12 days before the primary election in which the candidate is running for office.⁸ The
4 Committee filed its 2016 April Quarterly Report four days late and filed its Pre-Primary Report
5 seven days late.⁹ However, because the Committee filed its reports within a few days of the
6 deadline, the Commission dismisses the allegations that the Committee violated 52 U.S.C.
7 § 30104(a)(2)(A) and 11 C.F.R. § 104.5(a) as a matter of prosecutorial discretion under *Heckler*
8 *v. Chaney*.¹⁰

9 **B. Contributions Made by the Candidate**

10 The Complaint in MUR 7115 alleges that the candidate's husband made excessive
11 contributions to the Committee in the form of loans totaling \$10,000.¹¹ In addition, it alleges
12 that the Committee improperly identified "AJ Kern for Congress" as a contributor for a \$100
13 contribution in its 2016 July Quarterly Report.¹² In response, the Committee contends that the

⁷ 52 U.S.C. § 30104(a)(2)(A)(iii); 11 C.F.R. § 104.5(a)(1).

⁸ 52 U.S.C. § 30104(a)(2)(A)(i); 11 C.F.R. § 104.5(a)(2).

⁹ The Commission did not impose any administrative fines on the Committee in connection with these reports. Although the Committee filed its April Quarterly Report four days late, the level of activity and the number of days late did not meet the criteria for inclusion in the Commission's Administrative Fines Program. Moreover, the Committee filed its Pre-Primary Report fourteen days late after receiving a Request for Additional Information from the Commission, but the level of activity on the Pre-Primary Report did not meet the criteria for inclusion in the Administrative Fines Program.

¹⁰ 470 U.S. 821 (1985).

¹¹ Compl. at 1-2, MUR 7115. The Complaint also alleges that John Kern improperly contributed an additional \$963 to the Committee. *Id.* These contributions appear to be small contributions made through online portals, such as GoFundMe, or made in cash, none of which would have been reportable. The cash contributions are discussed in *supra* section II.C.

¹² *Id.* at 2.

1 candidate made the contributions.¹³ The Committee has amended the disclosure reports to reflect
2 her as the donor.

3 1. Excessive Contribution

4 The Act provides that no person shall make contributions to any federal candidate and his
5 or her authorized political committee aggregating in excess of a contribution limit indexed for
6 inflation each election cycle,¹⁴ which for the 2016 election cycle was \$2,700 per election.¹⁵ The
7 Act further provides that no candidate or candidate committees shall knowingly accept excessive
8 contributions.¹⁶ Contribution limits also apply to a candidate's family members.¹⁷

9 Nonetheless, federal candidates may themselves make unlimited contributions from their
10 own "personal funds" to their authorized campaign committees.¹⁸ When, however, a candidate
11 uses "personal funds" derived from jointly owned assets, the amount is limited to the candidate's
12 share of the asset.¹⁹

13 The Committee argues that the Kerns have substantial joint assets and references AJ
14 Kern's House Financial Disclosure Report in support of this.²⁰ According to that Report filed

¹³ *Id.*

¹⁴ 52 U.S.C. § 30116(a)(1).

¹⁵ See 52 U.S.C. § 30116(a)(1)(A); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 80 Fed. Reg. 5,750, 5,752 (Feb. 3, 2015).

¹⁶ 52 U.S.C. § 30116(f).

¹⁷ See *Buckley v. Valeo*, 424 U.S. 1, 51 n.57 (1976) (upholding the constitutionality of contribution limits as to family members because, "[a]lthough the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors").

¹⁸ 11 C.F.R. § 110.10.

¹⁹ See generally 52 U.S.C. § 30101(26); 11 C.F.R. § 100.33.

²⁰ Committee Resp. at 2, MUR 7115.

1 with the House of Representatives on May 16, 2016,²¹ the Candidate reported several assets held
2 jointly with her husband, including a Personal Savings account worth \$250,001-\$500,000.²²
3 Thus, the Candidate appears to possess sufficient personal funds to make the contributions to her
4 Committee.²³ Accordingly, the Commission finds no reason to believe that John Kern made, and
5 the Committee accepted, excessive contributions in violation of 52 U.S.C. § 30116(a) and (f).

6 2. Reporting of Candidate Contributions

7 The Act requires authorized committees to identify persons, other than a political
8 committee, who make a contribution in excess of \$200 within the election cycle.²⁴ Because the
9 Committee did not accurately disclose AJ Kern as the contributor of the loans described above in
10 the Committee's original reports, the Committee amended those reports, including its 2016 July
11 Quarterly Report, to reflect that AJ Kern, and not John Kern, had made two \$5,000 loans to the
12 Committee.²⁵ With respect to the contributions improperly attributed to the Committee, the
13 Committee claims that it made a technical error when recording these contributions in its FecFile
14 software.²⁶ After receiving the Complaint, the Committee states that it properly disclosed the
15 contributions as being made by the candidate.²⁷ Although the Committee failed to accurately
16 report AJ Kern as the contributor, given the amount in violation and the Committee's remedial

²¹ Aliena Jeanene Kern, Filing Year 2016 Financial Disclosure Report, Office of the Clerk of the U.S. House of Representatives (May 16, 2016).

²² *Id.*

²³ Committee Resp. at 2, MUR 7115.

²⁴ 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

²⁵ The Complaint also alleges that John Kern improperly contributed \$963 to the Committee, which pertains to the other allegations discussed herein. *See supra* section II.C.

²⁶ Committee Resp. at 2, MUR 7115.

²⁷ *Id.*; Amend. 2016 July Quarterly Report, AJ Kern for Congress (Sept. 25, 2016).

1 efforts, the Commission dismisses as a matter of prosecutorial discretion the allegations that the
2 Committee violated 52 U.S.C. § 30104(b)(3)(A).²⁸

3 **C. Alleged Cash Contributions**

4 The Complaint in MUR 7115 alleges that John Kern made excessive cash contributions
5 totaling \$576.²⁹ In response, the Committee states that those contributions attributed to John
6 Kern were small contributions ranging from \$3-\$50 that were made by a small group of donors
7 who were apparently anonymous.³⁰ The Committee amended its reports to remove John Kern as
8 a contributor.³¹

9 The Act prohibits any person from making a cash contribution greater than \$100.³² In
10 addition, Commission regulations provide that a candidate or committee receiving a cash
11 contribution in excess of \$100 must return the amount over \$100 to the contributor.³³ With
12 respect to anonymous cash contributions in excess of \$50, a committee must promptly dispose of
13 the amount that is over \$50.³⁴ Here, John Kern does not appear to have been the contributor for
14 the cash contributions at issue, and the Committee claims that it received no anonymous cash

²⁸ 470 U.S. 821 (1985).

²⁹ Compl. at 2, MUR 7115.

³⁰ Committee Resp. at 2, MUR 7115. The Committee originally reported receiving several contributions from John Kern noted as either "Cash Contribution" or "GoFundMe Contribution." See 2016 April Quarterly Report, AJ Kern for Congress (Apr. 19, 2016); 2016 July Quarterly Report, AJ Kern for Congress (Jul. 15, 2016). These contributions total \$387. Compl. at 1-2, MUR 7115. They include two GoFundMe contributions totaling \$125, one contribution from John Kern in the amount of \$140, and an additional \$122 contribution(s) from John Kern that was not itemized because he had not yet crossed the \$200 threshold. See *id.*; 2016 April Quarterly Report, AJ Kern for Congress (Apr. 19, 2016); 2016 July Quarterly Report, AJ Kern for Congress (Jul. 15, 2016). Thus, the Complaint alleges that John Kern's total excessive contributions totaled \$10,963. Compl. at 1-2, MUR 7115.

³¹ See Amend. 2016 April Quarterly Report, AJ Kern for Congress (Sept. 25, 2016); Amend. 2016 July Quarterly Report, AJ Kern for Congress (Sept. 25, 2016).

³² 52 U.S.C. § 30123.

³³ 11 C.F.R. § 110.4(c)(2).

³⁴ *Id.* § 110.4(c)(3).

1 contribution over \$50. The Commission has found no other information to the contrary.
2 Accordingly, the Commission finds no reason to believe that John Kern and the Committee
3 violated 52 U.S.C. § 30123 and 11 C.F.R. § 110.4(c).³⁵

4 **D. Alleged Prohibited Contribution**

5 The Complaint alleges that the Committee received a prohibited corporate contribution in
6 the amount of \$906.25 from The Boot Shack.³⁶ The Committee states that it contacted the
7 corporation after determining that it had deposited a corporate contribution and processed the
8 refund after the primary election.³⁷

9 The Act prohibits corporations from contributing to candidates or their authorized
10 committees,³⁸ and candidates and their authorized committees are prohibited from knowingly
11 accepting or receiving such contributions.³⁹ Further, no officer of a corporation may consent to a
12 corporate contribution.⁴⁰

13 The record indicates that the Committee contacted The Boot Shack and Durken regarding
14 The Boot Shack's contribution and subsequently refunded the prohibited contribution to The
15 Boot Shack.⁴¹ Although the refund occurred more than 30 days after the Committee received the

³⁵ To the extent that the Committee erred by attributing the \$576 in contributions to John Kern, the Commission dismisses the allegation that the Committee violated 52 U.S.C. § 30104(b)(3)(A) given the *de minimis* amount in violation and the Committee's remedial measures.

³⁶ Compl. at 3, MUR 7115.

³⁷ Committee Resp. at 3, MUR 7115.

³⁸ 52 U.S.C. § 30118(a).

³⁹ 11 C.F.R. § 114.2(d).

⁴⁰ 52 U.S.C. § 30118(a).

⁴¹ *Id.* at 3; *see also* Amend. 2016 October Quarterly Report, AJ Kern for Congress (Oct. 17, 2016).

1 prohibited contribution,⁴² the Committee took action to comply with Commission regulations.
2 Given the Committee's remedial measures and the amount in violation, the Commission
3 dismisses the allegations that the Committee violated 52 U.S.C. § 30118(a) as a matter of
4 prosecutorial discretion under *Heckler v. Chaney*.⁴³

5 **E. Failure to Include Required Notices in Solicitations**

6
7 The Complaint in MUR 7112 alleges that the Committee failed to include best efforts
8 information in its online solicitation forms and appears to suggest that the Committee failed to
9 itemize contributions by citing to 11 C.F.R. § 104.3(a)(4).⁴⁴ The Committee utilized a
10 GoFundMe account and used PayPal to process donations through its campaign website but did
11 not include statements regarding the Committee's responsibility to use its best efforts to obtain
12 required information about contributors nor disclaimers that fully complied with the Act and
13 Commission regulations.⁴⁵

14 **1. The Best Efforts Notice**

15 Under the Act's best efforts provision, when a treasurer of a political committee shows
16 that best efforts have been used to obtain, maintain, and submit the information required by the
17 Act, any report submitted by the committee will be considered to be in compliance with the
18 Act.⁴⁶ The Commission has further explained that "the best efforts provision is an affirmative

⁴² Commission regulations require the treasurer to examine contributions for evidence of illegality. 11 C.F.R. § 103.3(b). If legality of a contribution cannot be determined, the treasurer must refund the contribution within 30 days. 11 C.F.R. § 103.3(b)(5).

⁴³ 470 U.S. 821 (1985).

⁴⁴ The Complaint in MUR 7112 also alleges that the Committee violated 26 U.S.C. § 6113. This allegation is not within the Commission's jurisdiction, and therefore, the Commission takes no action regarding the alleged activity.

⁴⁵ Compl. at 1, Attach. A-K, MUR 7112.

⁴⁶ 52 U.S.C. § 30102(i); *see also* 11 C.F.R. § 104.7(a).

1 defense that a respondent must establish.”⁴⁷ Thus, while a committee may establish that it has
2 exercised best efforts by including language requesting a contributor’s name, address, occupation
3 and other identifying information in its written solicitations,⁴⁸ a committee’s failure to do so is
4 not a violation where the Committee otherwise complied with the reporting requirements of the
5 Act.

6 In its response, the Committee concedes that it did not include the “best efforts”
7 information on its websites, but states that the treasurer “personally contacted, asked for,
8 obtained and reported the occupation and employer of every donor, from whom we received
9 contributions on our internet portals (Paypal or GoFundMe) and which in aggregate, including
10 other forms of payment, exceeded \$200.”⁴⁹ The Committee also modified its online
11 communications to include best efforts information.

12 As discussed previously in this report, there were a small number of contributors that the
13 Committee inaccurately reported until filing amendments in response to the Complaints.⁵⁰
14 Nevertheless, it appears that none of those contributions exceeded \$200, and to the extent that
15 the Complaint in MUR 7112 alleges that the Committee violated the best efforts provision, the
16 Commission finds no reason to believe that the Committee violated 52 U.S.C. § 30102(i) and
17 11 C.F.R. § 104.7(a).

⁴⁷ See, e.g., Factual and Legal Analysis at 5, MUR 7043 (Put Alaska First); see also Statement of Policy Regarding Treasurers’ Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act, 72 Fed. Reg. 31,438, 31,440 (June 7, 2007) (“The best efforts standard is an affirmative defense and the burden rests with the political committee and its treasurer to present evidence sufficient to demonstrate that best efforts were made.”).

⁴⁸ See 11 C.F.R. § 104.7(b)(1).

⁴⁹ Committee Resp. at 2, MUR 7112. The Committee asserts that it only accepted one contribution that exceeded \$200 through its online portal via PayPal. *Id.* at 1-2.

⁵⁰ See *supra* sections II.B and II.C.

1 2. Disclaimers

2 All public communications made by a political committee as well as Internet websites of
3 a political committee must include a disclaimer as set forth in the Act and Commission
4 regulations.⁵¹ If such communication, including any solicitation, is paid for and authorized by a
5 candidate or an authorized committee, the disclaimer must clearly state that the communication
6 has been paid for by the authorized committee.⁵²

7 Copies of webpages attached to the Complaint in MUR 7112 did not include disclaimers
8 stating that the Committee both paid for and approved the communications.⁵³ In responding to
9 the Complaint, the Response included copies of revisions made to the webpages, which included
10 language identifying the Committee as paying for and authorizing the webpages.⁵⁴

11 Under the circumstances presented here, including the revisions made to the webpages,
12 the Commission dismisses the allegation that the Committee violated 52 U.S.C. § 30120(a)(1)
13 and 11 C.F.R. § 110.11 as a matter of prosecutorial discretion.⁵⁵

⁵¹ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1).

⁵² 52 U.S.C. § 30120(a)(1); 11 C.F.R. § 110.11(b)(1).

⁵³ Compl., Attach. A-I, MUR 7112.

⁵⁴ Committee Resp. at 2, Attach. 1-3, MUR 7112.

⁵⁵ *Heckler*, 470 U.S. at 821.